Supreme Court
FILED

No. __-____ 991479 MAR 6 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JONATHAN HADDAD,

Petitioner,

—v.—

ISAAC LIEBERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARTIN S. ECHTER, ESQ.*
c/o Office of Corporation Counsel
City of New Haven
165 Church Street
New Haven, Connecticut 06510
(203) 946-7958

Attorney for Petitioner
** Counsel of Record*

67 pp

QUESTIONS PRESENTED FOR REVIEW

Is a Police Officer constitutionally required to evaluate the possible alternative collateral *legal* consequences of the particular crime charged when there exists objective factual probable cause for the arrest?

PARTIES TO PROCEEDINGS BELOW

Plaintiff-Respondent Isaac Lieberman.

Defendant-Petitioner New Haven Police Officer Jonathan Haddad

Also, defendants New Haven Police Officers Robert Dudley, J. Savinelli, and David Coppola.

TABLE OF CONTENTS

Questions Presented for Review.....ii

Parties to Proceedings Below..... ii

Table of Contents.....iii

Table of Authorities.....iv

Petition for Writ of Certiorari

Orders Below.....1

Jurisdiction.....2

Constitutional and Statutory Provisions Involved.....2

Statement of the Case.....5

Reasons for Granting the Writ.....8

Appendix

TABLE OF AUTHORITIES

CASES

Biddle vs. *Martin*, 992 F.2d 673
(7th Cir. 1993).....13

Craig vs. *Krzeminski*, 764 F.Supp. 248
(D.Conn.1991).....14

Florida v. *Royer*, 460 U.S. 491, 103 S.Ct.
1319, 75 L.Ed.2d 229 (1983) 15

Foster v. *Metropolitan Airports Comm'n*,
914 F.2d 1076, 1080 (th Cir. 1990).....13

Gasho v. *United States*, 39 F.3d 1420
(9th Cir. 1994), *cert. denied*, 515 U.S. 1144,
115 S.Ct. 2582, 132 L.Ed.2d 831 (1995).....13

Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct.
2727, 73 L.Ed2d 396 (1982).....15

Hunter v. *Bryant*, 502 U.S. 224, 112 S.Ct. 534,
116 L.Ed.2d 589 (1991).....16

Klinger vs. *United States*, 409 F.2d 299
(8th Cir. 1969).....14

Peters v. *New York*, 392 U.S. 40, 88
S.Ct. 1889, 20 L.Ed2d 917 (1968).....15

Pfannstiel v. *City of Marion*, 918 F.2d 1178
(5th Cir. 1990).....13
Posr v. *Doherty*, 944 F.2d 91
(2d Cir. 1991).....8,9
Richardson v. *Bonds*, 860 F.2d 1427
(7th Cir. 1988).....13,14,15
Saffron vs. *Wilson, et al.*, 481 F.Supp. 228
(U.S.D.C. 1979).....14
Santiago v. *Fenton*, 891 F.2dd 373
(1st Cir. 1989).....14
Sibron v. *New York*, 392 U.S. 40, 88
S.Ct. 1889, 20 L.Ed2d 917 (1968).....15,16
State v.*Beckenbach*, 1 Conn. App. 669,
476 A.2d 591(1984).....11,12,17
State v. *Privitera*, 1 Conn. App. 709,
476 A.2d 605 (1984).....12,17
State v. *Weber*, 6 Conn. App. 407,
505 A.2d 1266 (1986).....11,12,16
Trejo v. *Perez*, 693 F.2d 482
(5th Cir. 1982).....13,15

United States vs. *Carr*, 445 F.Supp.
1383 (D.Conn. 1978).....14
United States vs. *Day*, 455 F.2d 454
(3d Cir. 1972).....
United States, ex rel. Senk vs. *Brierley*,
381 F. Supp. 447 (M.D. Pa. 1974),
aff'd, 511 F.2d 1396 (3d Cir.), *cert denied*,
423 U.S. 843, 96 S.Ct. 77,
46 L.Ed. 2d 63 (1975).....16
United States ex rel. LaBelle vs.
LaVallee, 517 F.2d 750 (2d Cir. 1975).....14
United States v. *Rambo*, 789 F.2d 1289
(8th Cir. 1986).....13
United States vs. *Salinas-Calderon*,
728 F.2d 1298 (10th Cir. 1984).....16
Vance v. *Nunnery*, 137 F.3d 270
(5th Cir. 1998).....14
Warren v. *City of Lincoln, Nebraska, et al.*,
864 F.2d 1436 (8th Cir. 1989).....16
Washington Mobilization Committee
v. *Cullinane*, 566 F.2d 107,

rehearing en banc denied (D.C. Cir. 1977).....13,14

Whren, et al., v. *United States*,

517 U.S. 806, 116 S.Ct. 1769,

135 L.Ed.2d 89, 98 (1996).....17

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the Constitution

of the United States.....2,3

Fourteenth Amendment to the Constitution

of the United States.....3

STATUTORY PROVISIONS

Connecticut General Statutes,

Section 53a-23.....3,4,12

Connecticut General Statutes,

Section 53a-36.....4,13

Connecticut General Statutes,

Section 53a-167a.....4,5,6,11

Connecticut General Statutes,

Section 53a-182.....5,7,10,12

No. __-____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JONATHAN HADDAD
Petitioner

v.

ISAAC LIEBERMAN,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ORDERS BELOW

A verdict after trial was delivered January 9, 1998. Judgment entered February 13, 1998. [Appendix 1A.] Timely motions for Posttrial relief and for attorney fees were filed

and decided in a Ruling on Pending Motions filed July 27, 1998. [Appendix 3A.] A Supplemental Judgment was filed August 7, 1998. [Appendix 24A.] A timely Notice of Appeal was filed August 26, 1998. [Appendix 26A.] The Court of Appeals ruled October 7, 1999. [Appendix 28A.] A timely Petition for Rehearing and Suggestion of En Banc Hearing was filed and denied by Order dated December 7, 1999. [Appendix 35A.] A timely Motion to Stay the Mandate was denied [Appendix 39A], and the Mandate issued [Appendix 37A], both on January 21, 2000. We will seek a partial stay from this Court.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the following constitutional provisions:

Fourth Amendment to the Constitution of the United States.

Searches and seizures. The right of the peopleto be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment to the Constitution of the United States.

Citizens rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Petitioner relies on the following statutory provisions:

Use of physical force to resist arrest not justified.

Connecticut General .Statutes, Section 53a-23. In Connecticut A person is not justified in using physical force to resist an arrest by a reasonably identifiable peace officer, whether such arrest is legal or illegal.

Imprisonment for misdemeanor: Maximum and minimum sentences, Connecticut General Statutes, Section 53a-36.

A sentence of imprisonment for a misdemeanor shall be a definite sentence and the term shall be fixed by the court as follows: (1) For a class A misdemeanor, a term not to exceed one year except that when a person is found guilty under section 53a-61(a)(3) or 53a-61a, the term shall be one year and such sentence shall not be suspended or reduced; (2) for a class B misdemeanor, a term not to exceed six months; (3) for a class C misdemeanor, a term not to exceed three months; (4) for an unclassified misdemeanor, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

Interfering with An Officer, C.G.S. 53a-167a.

In Connecticut

(a) A person is guilty of interfering with an officer when, with the intent to do so, he or she obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties.

(b) Interfering with an officer is a class A misdemeanor.

Disorderly Conduct, C.G.S. 53a-182. In Connecticut, (a) A person is guilty of Disorderly Conduct when, with intent to cause inconvenience annoyance or alarm, or recklessly creating a risk thereof, he or she (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or ... (6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse.

(b) Disorderly conduct is a class C misdemeanor.

STATEMENT OF THE CASE

By Respondent Isaac Lieberman's own account he observed Officers Dudley and Savinelli taking Juan Abreu into custody inside and thereafter outside, he observed them struggling on the ground outside, and he thought Mr. Abreu was in distress. [TTA, pp. 102-105, 121, 124, 442, 457, 512-

517, 535-36, Def. Exh. I; TTA, pp. 335-338M 512-517, 537A-537B.] [TTA refers to Trial Transcript Appendix.]

But, Mr. Lieberman also agreed that the police could not see that Mr. Abreu was in distress because of the direction in which Mr. Abreu was facing. [TTA, pp. 335-338, 512-517, 537A-537B.]

Again, by Mr. Lieberman's own account and that of other of plaintiff's witnesses and the defendant police officers, there was a crowd hostile to the police and Mr. Lieberman yelled "you're killing him," the officers told Mr. Lieberman to get back but he ignored their directive, and when the officers attempted to take him into custody and handcuff him he moved his arms and body to resist the handcuffing and he and Officers Haddad and Coppola fell to the ground. [TTA, pp. 174-179, 206-207, 330, 340, 355, 383-392 ,451-453, 538-539.] Mr. Abreu was arrested for numerous charges, later pleading guilty. [JA, 59.]

Mr. Lieberman had been specifically charged with Interfering with a Police Officer. Connecticut General Statutes, 53a-167a(a).

The Court, at Defendant-Petitioner's request, correctly instructed the jury that it could find "probable cause" if there was probable cause for either Interfering with an Officer or for the crime of Disorderly Conduct. Connecticut General Statutes, Section 53a-182(a)(1),(2) and (6). Also properly, in giving this instruction the Trial Court did not distinguish between the probable cause relevant to the claim of false arrest and the probable cause relevant to the claim of malicious prosecution. [TTA, 635-640.]

The civil jury found probable cause for the arrest of the plaintiff by Defendants Haddad and Coppola, the only officers alleged to have made a false arrest.

Nevertheless, the jury found a malicious prosecution by the defendant Haddad who had prepared the routine Case Incident Report shortly after the incident. [Pl's Trial Exhibit 2.]

> In his posttrial Ruling the Trial Judge speculated that
> . . . it is quite possible, and indeed probable, that the jury concluded that the defendants had probable cause to arrest the plaintiff on the lesser offense of disorderly conduct, but

> concluded that they did not have probable cause to charge him with interference with a police officer. *See Posr* v. *Doherty*, 944 F.2d 91, 100 (2d Cir. 1991)...

[Ruling on Pending Motions, pp. 4-5, Appendix 7A-8A.]

The appellate panel, also following *Posr*, similarly concluded that

> . . . A finding of probable cause to arrest does not, however, foreclose a cause of action for malicious prosecution if the plaintiff was prosecuted on a more serious charge for which there was no probable cause. . . . If the rule were otherwise, plaintiffs would have no remedy if they were arrested on a minor charge and maliciously prosecuted on a more serious one. . . .

[Appellate Panel ruling, page 3 (citation omitted), Appendix 32A.]

REASONS FOR GRANTING THE WRIT

The panel's decision, and *Posr* v. *Doherty*, 944 F.2d 91 (2d Cir. 1991), upon which the panel relied, is inconsistent

with decisions of this Court and of all other federal circuit courts and district courts we have found that have ruled on the issue, although even the federal courts vary as to the precise standards.

Only *Posr* and now the instant case permit a Court to consider the officer's possible subjective thoughts about the legal consequences of the respective crimes charged, rather than merely the objective factual basis for the arrest, in determining whether an arrest and prosecution was legally valid where several crimes charged all arise from the same facts, the crimes charged are similar or related, and the jury finds probable cause for one crime charged but not the other.

The result is that for the hundreds of thousands of arrests annually within the Second Circuit police are exposed to liability for malicious prosecution or false arrest even where the arrestees' liberty was properly seized, solely because of speculation about the officers' subjective reasons for charging more than one crime based on the same set of facts.

Discussion.

Mr. Lieberman had been charged with both Interfering with an Officer and with Disorderly Conduct.

As the Trial Court recognized and the jury found, there is manifestly probable cause to arrest and charge Mr. Lieberman for Disorderly Conduct.

Disorderly Conduct, C.G.S. 53a-182. In Connecticut,

(a) A person is guilty of Disorderly Conduct when, with intent to cause inconvenience annoyance or alarm, or recklessly creating a risk thereof, he or she (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or ...(6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse.

(b) Disorderly conduct is a class C misdemeanor.

As indicated above, the Trial Judge speculated that the jury found an absence of probable cause for the crime of Interfering with an Officer and that that was the basis for the finding of a malicious prosecution.

Interfering with An Officer, C.G.S. 53a-167a.

In Connecticut

(a) A person is guilty of interfering with an officer when, with the intent to do so, he or she obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties.[1]

(b) Interfering with an officer is a class A misdemeanor.

Also, in Connecticut a person cannot interfere with an arrest by a reasonably identifiable officer, whether such arrest

---

[1] ..."Those words, particularly 'interfere', have a broad scope. By using those words it is ... intended to prohibit any act which would amount to meddling in or hampering the activities of the police in the performance of their duties.... The [defendant's] act, however, does not have to 'be wholly or partially successful ... [nor ...] such as to defeat or delay the performance of a duty in which the officer is then engaged. The purpose of the statute, ..., origin in the common law, is to enforce orderly behavior in the important mission of preserving the peace; and any act that is intended to thwart that purpose is violative of the statute.'".... Quoted in *State* v. *Beckenbach*, 1 Conn. App. 669, 679, 476 A.2d 591 (1984); also *State* v. *Weber*, 6 Conn. App. 407, 505 A.2d

is legal or not and it is not a defense to the crime of Interfering with an Officer.[2]

Whatever Mr. Lieberman's subjective motives for refusing the directive to move back and for resisting the handcuffing, from the reasonable perspective of Officer Haddad, the only officer found liable for malicious prosecution, there was manifestly probable cause to arrest and charge Mr. Lieberman with the crime of Interfering with a Police Officer as well as the crime of Disorderly Conduct, Connecticut General Statutes, Section 53(a)(1),(2) and (6).

However, most important for purposes of this Petition, in every jurisdiction except the Second Circuit the arrest and the prosecution were legal and valid even if there was, hypothetically insufficient probable cause to support the crime of Interfering with an Officer.

1266 (1986); *State* v. *Privitera*, 1 Conn. App. 709, 719, 476 A.2d 605 (1984).

2 Connecticut General Statutes, Section 53a-23; *State* v. *Weber*, 6 Conn. App. 407, 505 A.2d 1266 (1986); *State* v. *Beckenbach*, 1 Conn. App. 669, 679, 476 A.2d 591 (1984); *State* v. *Privitera*, 1 Conn. App. 709, 719, 476 A.2d 605 (1984).

Interfering with an Officer and Disorderly Conduct are surely similar in nature and severity, and indeed, both are misdemeanors. Connecticut General Statutes Section 53a-36 indicates only a difference of nine months in the potential sentences for the respective crimes. (In fact, the Respondent offered no evidence as to the relative consequences of arrest for the two crimes.) Other federal courts that we found to have addressed the issue have unanimously rejected the principle of *Posr* in similar circumstances and concluded that it is irrelevant if the officer mislabels the crime charged or did not select the correct crime to charge, provided there is objective probable cause for a similar or related crime. *Gasho* v. *United States*, 39 F.3d 1420, 1428 n. 6 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995); *Biddle* v. *Martin*, 992 F.2d 673, 676 (7th Cir. 1993); *Pfannstiel* v. *City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990); *Foster* v. *Metropolitan Airports Comm'n*, 914 F.2d 1076, 1080 (th Cir. 1990); *Richardson* v. *Bonds*, 860 F.2d 1427, 1430 (7th Cir. 1988); *United States* v. *Rambo*, 789 F.2d 1289,1294 (8th Cir. 1986); *Trejo* v. *Perez*, 693 F.2d 482, 486 (5th Cir. 1982); *Washington Mobilization Committee* v.

Cullinane, 566 F.2d 107, 123, *rehearing en banc denied* (D.C. Cir. 1977), *Saffron* v. *Wilson, et al.*, 481 F.Supp. 228, 242 (U.S.D.C. 1979);.*United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 753-754 (2d Cir. 1975); *United States* v. *Carr*, 445 F.Supp. 1383 (D.Conn. 1978); *Craig* v. *Krzeminski*, 764 F.Supp. 248, 250 .Conn.1991); *Klinger* v. *United States*, 409 F.2d 299, 305 (8th Cir. 1969) (citations omitted). *Cf.*, *Vance* v. *Nunnery*, 137 F.3d 270 (5th Cir. 1998); *Santiago* v. *Fenton*, 891 F.2d 373 (1st Cir. 1989). A few of the foregoing cases go farther than others, but the Second Circuit is inconsistent with all.

> [W]e do not believe that the officer's view of the *legal* basis for the arrest is important....
>
> Disputes about an arresting officer's actual state of mind at the time of the arrest would quickly resolve themselves into credibility battles, with each side presenting its own *post hoc* explanation of the officer's

actions. *See Trejo* v. *Perez*, 693 F.2d 482, 486 (5th Cir. 1982) . . . .[3]

It does not even matter that there is some ambiguity about whether or not the officer thought he or she had probable cause to arrest, or even that the officer affirmatively believed he or she did not have adequate probable cause to arrest. All that is required is that there exist objective probable cause for some crime in order that the arrest be valid. *Florida* v. *Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Peters* v. *New York*, decided with *Sibron*

---

3 *Richardson* vs. *Bonds*, 860 F.2d 1427, 1430 (7th Cir. 1988).

"Despite the availability of these tactics, the question of an officer's actual justification for an arrest would rarely be capable of resolution at the summary judgment stage, but would ultimately become a credibility issue for the jury. The objective of *Harlow*, that qualified immunity issues be resolved at the earliest possible stage of the litigation, would be frustrated. In fact, it is for precisely this reason that *Harlow* vs. *Fitzgerald* , 457 U.S. 800, 815-19 (1982)] reformulated the qualified immunity analysis to eliminate inquiry into subjective factors." *Richardson* vs. *Bonds*, *supra*, 860 F.2d at 1430 (some citations omitted; italics in original).

v. *New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968); *United States* v. *Salinas-Calderon*, 728 F.2d 1298, 1300-1301 (10th Cir. 1984); *Warren* v. *City of Lincoln, Nebraska, et al.*, 864 F.2d 1436, 1439-40 (8th Cir. 1989); *United States, ex rel. Senk* v. *Brierley*, 381 F. Supp. 447, 463 (M.D. Pa. 1974), *aff'd*, 511 F.2d 1396 (3d Cir.), *cert denied*, 423 U.S. 843, 96 S.Ct. 771 46 L.Ed. 2d 63 (1975), quoting from *United States* v. *Day*, 455 F.2d 454, 456 (3d Cir. 1972).

Where the crime charged, although incorrect, is similar or related to either a proper criminal charge or to the evidence of criminal activity, the courts effectively recognize that the officer acted with objective reasonableness in making the arrest and in levying the particular charge, even though mistakenly.

This is the classic basis for excusing liability and suit on grounds of "qualified immunity," *i.e.*, where the officer acted with objective reasonableness although mistakenly. Indeed, we repeatedly argued at trial and on appeal, that at the very least Officer Haddad is entitled to "qualified immunity," *Hunter* v. *Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), since Connecticut law clearly held

equally and even less egregious situations are sufficient to establish guilt of Interfering with an Officer. *State* v. *Weber*, 6 Conn. App. 407, 414, 505 A.2d 1266 (1986); *State* v. *Beckenbach*, 1 Conn. App. 669, 679, 476 A.2d 591(1984); especially see Footnote 1 *supra*.

Speculation about whether the charging officer was trying to procure a higher bail or longer pretrial detention, or speculation about the officer's subjective view of the legal (as opposed to the factual) basis for the charges lodged is in violation of the principle that the validity of the officer's action in making an arrest or in levying a criminal charge is to be examined by objective evidence, not by evaluation of the officer's possible subjective state of mind. *Whren, et al.* v. *United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, 98 (1996), ("... Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Conclusion. There are certainly hundreds of thousands of arrests and prosecutions annually within the Second Circuit, and there is an active civil rights bar specializing in lawsuits alleging police misconduct. Within

the Second Circuit arresting officers are exposed to civil liability solely because of speculation about the subjective reasons why an officer charged more than one crime based on the same set of facts.

RESPECTFULLY SUBMITTED,
MARTIN S. ECHTER, Esquire

APPENDIX

TABLE OF CONTENTS

Table of Contents.....iA

Judgment.....1A

Ruling on Pending Motions.....3A

Supplemental Judgment.....24A

Order of the United States Court
Of Appeals for the Second Circuit.....28A

Order denying Petition for Rehearing and
Suggestion of En Banc Hearing.....35A

Mandate.....37A

Order denying Motion to Stay Mandate.....39A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ISAAC LIEBERMAN

v. CIVIL NO. 3:95CV2437(AHN)

ROBERT DUDLEY, ET AL.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Alan H. Nevas, United States District Judge, and the issues having been duly tried and the jury having duly rendered its verdict,

It is therefore **ORDERED and ADJUDGED** that judgment be and hereby is entered in favor of the plaintiff Isaac Lieberman as against David Coppola in the amount of $4,415.00 for unreasonable force under 42 U.S.C., Sec. 1983; $15,000.00 punitive damages for unreasonable force under 42 U.S.C., Sec. 1983; and $1,600.00 plus state law punitive damages for assault and battery; and

In favor of plaintiff Isaac Lieberman as against Jonathan Haddad in the amount of $9,900.00 for malicious prosecution under 42 U.S.C., Sec. 1983; $10,000.00 punitive

damages for malicious prosecution under 42 U.S.C., Sec. 1983; and

In favor of plaintiff Isaac Lieberman as against David Coppola and Jonathan Haddad in the amount of $25,000.00 plus state law punitive damages for intentional infliction of emotional distress; in accordance with the Jury's verdict.

Dated at Bridgeport, Connecticut this 13th day of February, 1998.

KEVIN. F. ROWE, Clerk

By_____

Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ISAAC LIEBERMAN

v. CIVIL NO. 3:95CV2437(AHN)

ROBERT DUDLEY, ET AL.

RULING ON PENDING MOTIONS

The jury in this case returned a verdict for the plaintiff on his §1983 claims of malicious prosecution and unreasonable force as well as on his state law claims of intentional infliction of emotional distress and assault and battery. In addition to compensatory damages, the jury awarded punitive damages on all claims. Presently pending before the court are the defendants' motion for judgment on the law [doc. # 75] and the plaintiff's motion for costs and attorney's fees [doc. # 72] The plaintiff also seeks calculation of the amount of punitive damages to be awarded in accordance with the jury's verdict on his state law claims.

Background

The jury awarded the plaintiff $9,900 compensatory and $10,000 punitive damages against defendant Haddad on the § 1983 claim for malicious prosecution. It awarded him compensatory damages of $4,415 and punitive damages of $15,000 against defendant Coppola on the § 1983 claim for unreasonable force. With respect to the state law claims, the jury awarded the plaintiff compensatory damages of $25,000 jointly against defendants Haddad and Coppola for intentional infliction of emotional distress and $1,600 compensatory damages against defendant Coppola on the assault and battery claim. The jury also awarded punitive damages on both state law causes of action.

The jury returned a verdict for the defendants on the § 1983 claim based on false arrest.

Discussion

I. Judgment As a Matter of Law

The defendants maintain that the jury's verdict for the plaintiff on the § 1983 malicious prosecution claim must be set aside because it is inconsistent with the verdict for the defendants on the § 1983 false arrest claim. The defendants also assert that the award of damages on the emotional

distress claim cannot stand because it is duplicative of the damages awarded for assault and battery. They also contend that the verdicts for unreasonable force and assault and battery must be vacated because the force was reasonable as a matter of law, or because the damages are duplicative.

Although the defendants have moved for judgment as a matter of law, they did not preserve their right to do so at trial. "The rule is well established that a motion for directed verdict at the close of all the evidence is a prerequisite for judgment as a matter of law." Cruz v Local Union No. 3 of Int'l Bhd. Of Elec. Workers, 34 F.3d 1148, 1155 (2d Cir. 1994). Rather, the defendants should have raised their post-trial claims in a motion for a new trial pursuant to Fed. R. Civ. P. 59. See Blissett v. Eisensmidt, 940 F. Supp. 449, 453 (N.D.N.Y. 1996). A new trial may be granted to prevent manifest injustice if the trial court is convinced that (1) the jury verdict is against the weight of the evidence, (2) the jury reached a seriously erroneous result, or (3) if the verdict is a miscarriage of justice. See U.S. East Telecommunications, Inc. v U.S. West Communications Serv. Inc., 38 F.3d 1289, 1301 (2d Cir. 1994); Smith v. Lightening Bolt Prod., Inc., 861 F.2d 363 (2d Cir. 1988);

Katara v D.E. Jones Commodities Inc.-, 835 F.2d 966, 970 (2d Cir. 1978). Unlike a judgment as a matter of law, a new trial may be granted even if there is substantial evidence to support the verdict. Song v. Ives Labs. Inc., 957 F.2d 1041, 1047 (2d Cir. 1992). In evaluating a motion for a new trial, the court is free to weigh the evidence and need not view it in the light most favorable to the non-moving party. Id. Accordingly, the court will construe the defendants' motion as a motion for new trial and will consider their arguments in light of that standard.

A. Malicious Prosecution

The defendants arrested the plaintiff and charged him with interference with a police officer. He was subsequently prosecuted on that charge, pleaded not guilty, and was acquitted. In this action, the jury returned a verdict for the plaintiff on his claim of malicious prosecution, but not on his false arrest claim. The defendants now claim that because the jury found that the plaintiff was lawfully arrested, it was only logical that the jury found probable cause for instituting the criminal prosecution. Thus, they assert that the verdict on the malicious prosecution claim is impermissibly

inconsistent with the verdict on the false arrest claim. The court does not agree.

Contrary to the defendants' claim, the jury was not inconsistent in finding for the plaintiff on the malicious prosecution claim while finding the defendants not liable for false arrest. Because the elements establishing each of these causes of action are different[1], it is quite possible, and indeed

---

[1] To prevail on a claim of false arrest in violation of the Fourth Amendment, a plaintiff must establish that the arresting officers did not have probable cause for the arrest. Probable cause requires only a probability or substantial chance of criminal activity. But a finding of probable cause is not contingent on whether the officer articulated the correct basis for the arrest. Thus, the jury was charged in this case that even if the defendants did not have probable cause to arrest the plaintiff for interference with a police officer, the arrest could be found legal if there was probable cause to arrest the plaintiff on the lesser included offense of disorderly conduct.

The plaintiff's claim for malicious prosecution was based on the allegation that one of the defendants filed a false police report which resulted in his prosecution on the charge of interfering with a police officer. To prevail on this claim the plaintiff was required to establish that the defendant instituted or procured the institution of criminal proceedings against him with malice and without probable cause.

probable, that the jury concluded that the defendants had probable cause to arrest the plaintiff on the lesser offense of disorderly conduct, but concluded that they did not have probable cause to charge him with interference with a police officer. See Posr v. Doherty, 944 F.2d 91, 100 (2d Cir. 1991) (holding that a finding of probable cause on a lesser charge does not foreclose a malicious prosecution cause of action where plaintiff was prosecuted on charges requiring more culpable behavior). As the Second Circuit has noted, if the rule were otherwise, an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause for the lesser offense would insulate him from liability for malicious prosecution on the more serious offense. See id.

Because there is no inconsistency in the jury's verdicts on the false arrest and malicious prosecution claims, the defendants' motion is denied.

B. Intentional Infliction of Emotional Distress

The defendants also argue that the damage award on the intentional infliction of emotional distress claim is duplicative because the plaintiff was compensated for his emotional distress injuries as an element of damages for the § 1983 violation and the assault and battery claim. They maintain that the damage award on the intentional infliction of emotional distress claim must be set aside because a plaintiff may not be compensated more than once for the same injury.

The defendants are correct that a plaintiff may be compensated only once for an injury. See Gentile v. County of Suffolk, 926 F.2d 142, 153 (2d Cir. 1991) (holding that if two causes of action provide a legal theory for compensating one injury, there can only be one recovery). But the defendants have not established that this rule was violated in this case. Although emotional pain is a compensable component of damages for a § 1983 action based on unreasonable force and malicious prosecution, the tort of intentional infliction of emotional distress involves a component of damages over and above the damages that may

be awarded for a § 1983 violation. See Bender v City of New York, 78 F.3d 787, 793 (2d Cir. 1996). Here, the plaintiff presented evidence that he suffered multiple injuries as a result of the violations of his rights under state and federal law, including physical injuries, pain and suffering, medical expenses, emotional distress and attorney's fees. The evidence supports a finding that the plaintiff suffered discrete and unduplicated injuries, and that the plaintiff was not compensated twice for emotional distress.

This conclusion is further supported by the fact that the jury found only against defendant Haddad on the malicious prosecution claim and only against defendant Coppola on the unreasonable force claim, but found against both defendants jointly on the emotional distress claim. It is thus reasonable to assume that the jury made a purposeful apportionment of damages between the different causes of action. See Indu Craft, Inc. v Bank of Baroda, 47 F.3d 490, 497 (2d Cir. 1995).

Moreover, because the calculation of damages in a § 1983 action may be difficult, especially where, as here, there were pendent state law claims, district courts must carefully

instruct the jury that a plaintiff may not be compensated twice for the same injury merely because the injury may have been caused by a violation of different rights. See id. Accordingly, the jury in this case was instructed to avoid such duplicative awards[2] and the court must presume that the

---

[2] The jury here was instructed:

Because there is more than one defendant and more than one claim in this case you must keep in mind that an injury may be compensated only once and that there may not be additional compensatory damages for that same injury from two or more defendants. . .

[A]lthough there are multiple claims in this case, you should not award compensatory damages more than once for the same injury. In other words, if two or more causes of action provide a legal theory for compensating one distinct injury, only one recovery may be awarded. But if different injuries are attributed to the separate claims, then you should compensate the plaintiff for those separate injuries.

If you find that the identical injury was caused by more than one wrong, you should award damages for the first such wrong and as to any subsequent wrong, indicate on the damages line of the verdict form the words "Please see award number _____."

jury followed the court's instructions. See Agard v Portuondo, 117 F.3d 696, 720 (2d Cir. 1997) (citing Connecticut v. Johnson, 460 U.S. 73, 85 n.14 (1983)).

Because the defendants have not provided clear evidence that the jury's separate award of compensatory damages on the state law tort of intentional infliction of emotional distress is duplicative of the damages awarded for malicious prosecution and assault and battery, the court must defer to the jury's findings. See Gentile, 926 F.2d at 153. The defendants' motion on this issue is denied.

C. Unreasonable Force and Assault and Battery

Finally, the defendants argue that the verdicts for the plaintiff on the § 1983 claim based on unreasonable force and the state law claim for assault and battery cannot stand because the force used under the circumstances was reasonable as a matter of law. Alternatively, they maintain that the jury's award of compensatory damages on both claims are impermissibly duplicative.

1. Sufficiency of the Evidence

There is no merit to the defendants' claim that the unreasonable force and assault and battery claims are not

supported by the evidence. To the contrary, the plaintiff presented evidence that defendant Coppola kicked him in the head after he had fallen to the ground and that he suffered serious injuries. This evidence is sufficient to sustain the verdict on both claims. See Galdieri-Ambrosini v National Realty & Dev. Corp., 136 F.3d 276, 289 (2d Cir. 1998).

2. Duplicative Damage Awards

There is also no merit to the defendants' claim that the jury impermissibly awarded duplicative damages on the Sec. 1983 unreasonable force claim and the state law claim of assault and battery.

The flaw in the defendants' argument is that a jury award is not duplicative merely because it allocates damages under the two distinct causes of action. See Indu Craft, 47 F.3 at 497; Gentile, 926 F.2d at 154. While it is possible that the jury impermissibly compensated the plaintiff twice for the same injury, it is also plausible that the separate awards represent a purposeful apportionment of damages between the two causes of action. Thus, because the court must reconcile and preserve wherever possible a seemingly duplicative or inconsistent jury verdict, see Indu Craft, 47

F.3d at 497, the court may overturn the verdicts only if it would have been impossible for the jury to have awarded separate and distinct damages on the unreasonable force and assault and battery claims. See id.; Gentile, 926 F.2d at 154. It is not impossible that the jury found the plaintiff suffered damages in the amount of $6,015 as a result of the force used by defendant Coppola and that it merely allocated that amount between the federal and the state causes of action. Thus, the verdicts on these two causes of action will not be set aside.

II. Attorney's Fees Under § 1988 & State Law Punitive Damages

The plaintiff moves for an award of attorney's fees and costs under 28 U.S.C. § 1988 as well as punitive damages in accordance with the jury's verdict on the state law claims. He asserts that under Connecticut law the amount of punitive damages is measured by the amount of the plaintiff's attorney's fees and non-taxable costs. Thus, he seeks one-third of the amount of compensatory damages awarded on the two state law claims in accordance with the contingency fee agreement he has with his attorney.

The defendants argue that the plaintiff is not entitled to state law punitive damages because under Connecticut law only litigation expenses may be recovered as punitive damages. Thus, because the plaintiff will recover his litigation expenses under § 1988, the defendants maintain that an award of state-law punitive damages would be impermissibly duplicative.[3] Alternatively, the defendants argue that punitive damages on the state law claims would be impermissibly duplicative of the punitive damages awarded on the § 1983 claims.

The question of whether a plaintiff may recover state law punitive damages. as limited by litigation expenses, as well as a statutory award of attorney's fees under § 1988 presents a novel issue of Connecticut law for which there is no direct authority. The defendants' rely on Berry v. Loiseau, 223 Conn. 786, 807 (1992). The plaintiff, also relying on

---

[3] There is no merit to the defendants' additional contentions that the contingency fee arrangement in this case is, under Connecticut law, the exclusive method for compensating the plaintiff for his attorney's fees, or that the court may not consider the contingency fee agreement in assessing the amount of punitive damages. See Berry v. Loiseau, 223 Conn. 786, 829-30 (1992).

Berry,[4] maintains that the defendants' argument is based on a fundamental misunderstanding of state law. He asserts that the proper interpretation of Connecticut law relating to punitive damages is that the amount of punitive damages is only measured, or capped, by the amount of attorney's fees, and are not limited to attorney's fees.

The court disagrees. It appears to be well settled that common-law punitive damages in Connecticut are only intended to compensate the plaintiff for his litigation expenses less taxable costs. See id, at 825. Indeed, the continuing viability of this longstanding and well-established rule was reaffirmed in Berry, where the court declined an invitation to abandon it in favor of punitive damages based on a theory of vindication or retribution. In so doing, the

---

[4] The plaintiff incorrectly asserts that Berry specifically permitted the plaintiff to recover attorney's fees under both the federal civil rights statute and as state law punitive damages. To the contrary, Berrx did not involve a § 1983 claim. It involved an employee's action against his former employer for false imprisonment, assault and battery, wrongful termination, breach of the covenant of good faith, defamation, and intentional infliction of emotional distress. See Berry, 223 Conn. at 786.

court noted "the long line of cases holding that common law punitive damages serve primarily to compensate the plaintiff for his injuries," and that the Connecticut rule "fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him. . . ." Id. (citations and internal quotations omitted).[5]

---

[5] In Linsley v. Bushnell, 15 Conn. 225 (1842), the Connecticut Supreme Court first sanctioned an award of vindictive damages or "smart money" to a plaintiff who prevailed in a case of wanton and malicious injury. The court held that such damages were permissible because a successful plaintiff had a "right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him." Id. at 236-37. The rule developed because litigation expenses were not considered a natural or proximate consequence of the defendant's wrongful act and thus could not be recovered as a component of actual damages. See St Peter's Church v. Beach, 26 Conn. 355, 366 (1857). Rather, where the defendant's conduct was not wanton or malicious, courts generally recognized that "the defendant should not be punished by being compelled to pay not only his own counsel but such as the plaintiff may please to select to advocate his claims against the defendant, but each should be left to conduct his own case, and in his own way, and at his own expense beyond what the statute allows in a bill of costs to the prevailing party." Id. at 366-67. See also Platt v. Brown, 30 Conn. 336, 342-43

For these reasons, the court finds that the plaintiff is entitled to punitive damages in an amount equal to the attorney's fees for which he would be liable under the contingency fee agreement. Thus, the plaintiff may recover one-third of the $25,000 compensatory damage award, or $8,333.33, on the emotional distress claim, and one-third of the $1,600 compensatory damage award on the assault and battery claim, or $533.33.[6] The plaintiff is also entitled to non-taxable costs of $800, representing the disbursement for

---

(1862) (stating that the reason for allowing exemplary damages in the amount of litigation expenses over and above taxable costs is so that a plaintiff may recover full indemnity for injuries caused by the wanton act of a defendant).

[6] The plaintiff sought one-third of the compensatory damage award of $25,000 from each defendant, or $16,666.66 on the emotional distress claim and one-third of the $1,600 compensatory damage award, or $533.33, from Coppola on the assault and battery claim. The plaintiff offered no authority to support his claim of entitlement to one-third of the award from each defendant, and the court can find none. Nonetheless, the court finds that an award of one-third of the compensatory damage award from each defendant would be unreasonable and contrary to the plain language of the contingency fee agreement between the plaintiff and his attorney.

expert witness fees which the court finds was reasonably necessary for prosecuting this action. See Markey v. Santangelo, 195 Conn. 76, 80 (1985). However, to avoid a windfall and an impermissible double recovery of legal fees for the same services rendered on the federal and state claims, this amount must be deducted from the amount of attorney's fees awarded under § 1988. Cf. Higgins v. Burlegh, Civil No. 3:92vcv642 (D. Conn. May 6, 1997).

In determining a reasonable attorney's fee award under 42 U.S.C. § 1988, the court multiplies the number of hours reasonably expended by the hourly rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. See Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). Here, the plaintiff's counsel has filed an affidavit in which he seeks reimbursement for 62.1 hours at an hourly rate of $300. The defendants do not dispute the reasonableness of the time spent by the plaintiff's attorney, but maintain that the $300 hourly rate is excessive and not comparable with the prevailing rate for attorneys in the District of Connecticut

with the skill and experience of the plaintiff's attorney. The court agrees.

A fee applicant must produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum, 465 U.S. at 895-96. Although the plaintiff submitted an affidavit of his attorney in support of the requested hourly rate, he has not submitted any evidence showing that the requested rate is in line with the rate in the community for other lawyers with the same expertise and experience. Thus, the court may rely on its knowledge of the prevailing market rates in this community, and the rates that other Connecticut courts have found reasonable. See Miele v. York State at Teamsters Conf. Pension & Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987).

Based on the court's knowledge of the prevailing market rates in Connecticut as well as on a survey of recent attorney's fee awards in this District, the court concludes that an hourly rate of $250 is the prevailing rate for a civil rights attorney with the skill and experience of the plaintiff's

attorney. See Skubel v. Sullivan, No. 90-279, 1998 WL 136176, at *3 (D. Conn. Mar. 11,1998) (awarding $250 per hour for lawyer with twenty-three years specialized federal court experience who also teaches at Yale Law School); Laudano v. City of New Haven, No. 330523, 1998 WL 281824 (Conn. Super May 14, 1998) (finding $250 per hour reasonable in civil rights case for partners with over twenty years experience); CG v. New Haven Bd. of Ed., 988 F. Supp. 60, 69 (D. Conn. 1997) (awarding $250 per hour to partner in Connecticut firm with twenty-two years of specialized litigation experience in federal court).

Accordingly, the plaintiff is entitled to an award of attorney's fees in the amount of $15,525. However, to avoid a windfall and duplicate fees for the same services, this amount must be reduced by $8,866.66, representing the attorney's fees awarded on the state law claims of emotional distress and assault and battery. The plaintiff is also entitled to costs reasonably incurred in prosecuting this case, including filing fees, witness fees and process server fees, which total $435.

III. Remittitur

The defendants also maintain that the jury's verdicts are excessive and that the court should grant a remittitur. Remittitur is the "process by which a court compels a plaintiff to chose between reduction of an excessive verdict and a new trial." Earl v -Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1994) (quoting Shu Tao Lin v McDonnell Douglas Corp., 742 F.2d 45, 48 (2d Cir. 1984)). Because the court does not find the jury's verdicts to be excessive, there is no ground to support a remittitur in this case. See id.

CONCLUSION

For the foregoing reasons, the defendants' motion for judgment on the law [doc. # 75] is DENIED. The plaintiff's motion for attorney's fees and costs [doc. # 72] **is GRANTED**. A supplemental judgment in the amount of $16,760, representing common-law punitive damages in the amount of $9,666.66 and attorney's fees and costs under § 1988 in the amount of $7,093.34, shall enter in the plaintiff's favor.

SO ORDERED this day of July, 1998 at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ISAAC LIEBERMAN

v. CIVIL NO. 3:95CV2437(AHN)

ROBERT DUDLEY, ET AL. .

SUPPLEMENTAL JUDGMENT

The jury having found in favor of the plaintiff on his complaint and now comes counsel or the plaintiff for consideration of award for attorneys fees before the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection herewith issued its Ruling on Pending Motions denying the defendants' motion for judgment m the law and granting the plaintiffs motion for attorney's fees and costs and further directed he Clerk to enter a supplemental judgment in the amount of $16,760.00, representing common-law punitive damages in the amount of $96,666.66 and attorney's fees and costs finder Sec. 1988 in the amount of $7,093.34 in favor of the plaintiff,

It is therefore **ORDERED** and **ADJUDGED** that judgment be and hereby is entered in favor of the plaintiff Isaac Lieberman as against the defendants in the amount of $16,760.00, in accordance with the Court's order.

Dated at Bridgeport, Connecticut on this 7th day of August, 1998.

KEVIN F. ROWE, Clerk

By:_____
Carol E. Cannady,
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ISAAC LIEBERMAN **NO. 3:95CV2437(AHN)**

v.

ROBERT DUDLEY, ET AL. **AUGUST 26, 1998**

NOTICE OF APPEAL

The defendants Jonathan Haddad and David Coppola herewith give notice of appeal from all portions of the January 9, 1998 verdict adverse to each of them, from hat portion of the Judgment of February 13, 1998 adverse to each of them, from the vial Court's Ruling on Pending Motions (including, but not limited to, posttrial motion for idgment on the law, imposition and calculation of state law punitive damages, and sward of attorney fees and costs), filed July 27, 1998, and from the Supplemental udgment filed August 7, 1998.

RESPECTFULLY SUBMITTED,

BY:_____

Martin S. Echter, Esquire
c/o Office of Corporation Counsel
165 Church Street
New Haven, CT 06510
Phone: (203) 946-7958
Fax: (203) 946-7942
Fed. Bar No. ct07596
PAGER: 1-860-590-4432

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE,OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 7 day of OCT, one thousand nine hundred and ninety-nine.

PRESENT:

HONORABLE JAMES L. OAKES,
HONORABLE ELLSWORTH VAN GRAAFEILAND,
HONORABLE ROBERT D. SACK,

Circuit Judges.

ISAAC LIEBERMAN,
Plaintiff-Appellee,

- V. - No. 98-9165

ROBERT DUDLEY and J. SAVINELLI,
Defendants

JONATHAN HADDAD and DAVID W. COPPOLA,
Defendants-Appellants.

APPEARING FOR APPELLANT:
Martin S. Echter, Office of the Corporation Counsel City of New Haven, Connecticut, New Haven, CT.

APPEARING FOR APPELLEE:
Norm Pattis (John R. Williams, of counsel), New Haven, CT.

Appeal from the United States District Court for the District of Connecticut (Alan H. Nevas, Judge).

UPON DUE CONSIDERATION, IT IS-HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Jonathan Haddad and David W. Coppola appeal from a February 13, 1998 judgment of the United States District Court for the District of Connecticut (Allan H. Nevas, Judge) following a jury verdict finding Haddad liable for malicious prosecution, Coppola liable for unreasonable use of force and assault and battery, and both defendants liable for intentional infliction of emotional distress. Compensatory and punitive damages were awarded on each cause of action.

After judgment was entered against them, the defendants filed a motion for judgment on the law that the district court denied in its Ruling on Pending Motions of July 24, 1998. In a Supplemental Judgment of August 7, 1998, the court calculated the plaintiff's total punitive damages award. Haddad and Coppola appeal these rulings as well as the judgment.

Haddad and Coppola are New Haven police officers. On November 13, 1993, they, in the company of other officers, responded to a report of a woman being beaten. When they arrived on the scene, they became involved in an altercation with Juan Abreu, a tenant of the plaintiff, Isaac Lieberman. Lieberman intervened because he believed that the police were beating Abreu while he was handcuffed and vomiting and that Abreu might therefore be injured or killed.

Lieberman was arrested for interfering with the police and was subsequently prosecuted in Connecticut Superior Court. He was acquitted on January 23, 1995. Lieberman then brought this suit under 43 U.S.C. § 1983, alleging that he had been falsely arrested, maliciously prosecuted, exposed to unreasonable force, assaulted and battered, and suffered intentional infliction of emotional distress. The jury found that no false arrest had taken place, but that Haddad's preparation of a false police report constituted a malicious prosecution and that Coppola had used unreasonable force in arresting Lieberman. Both defendants were found to have intentionally inflicted emotional distress upon the plaintiff.

On appeal, the defendants argue that the jury's finding that no false arrest occurred is irreconcilable with the malicious prosecution verdict, that there was insufficient evidence to support the verdicts, that there were no grounds for independent damages on the intentional infliction of emotional distress claims, that the trial judge erred in not allowing them to impeach the testimony of Abreu, and that the district court calculated punitive damages incorrectly.

Probable cause is a necessary component of both a proper arrest and a proper prosecution. A finding of probable cause to arrest does not, however, foreclose a cause of action for malicious prosecution if the plaintiff was prosecuted on a more serious charge for which there was no probale cause. See *Posr* v. *Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). If the rule were otherwise, plaintiffs would have no remedy if they were arrested on a minor charge and maliciously prosecuted on a more serious one. Id. There is therefore no contradiction between the false arrest and malicious prosecution verdicts in the present case.

The defendants argue that the causes of action for unreasonable use of force and assault and battery overlap,

and that the intentional infliction of emotional distress claim overlaps all of the other claims against them. They therefore assert that the jury must have awarded duplicative damages.

However, "a jury's award is not duplicative simply because it allocates damages under two distinct causes of action." *Indu Craft, Inc.* v. *Bank of Baroda*, 47 F.3d 490, 497 (2d Cir. 1995). Moreover, this Court has noted that, "the tort of inflicting emotional distress in the context of a false arrest or a malicious prosecution possibly involves some component of damages over and above the damages that may be awarded for these police misconduct torts." *Bender v. City of New* York, 78 F.3d 787 (2d Cir. *1996).* In its jury instruction the district court gave exactly the kind of detailed warning about duplicative damage awards that we asked for in *Bender.* We therefore have no basis upon which to set aside the awards returned by the jury.

As for the impeachment of Abreu's testimony by evidence of his conviction of a crime subsequent to his recorded testimony, evidentiary errors are not grounds for reversal unless affirmance would be "inconsistent with substantial justice." Fed. R. Civ. P. 61. There is no reason to

believe that permitting defendants to further impeach Abreu's already impeached testimony through introduction into evidence of his subsequent conviction would have had a significant impact on the jury's assessment of his credibility, let alone the verdict. It was within the trial court's discretion, moreover, to prohibit the use of Abreu's conviction for impeachment purposes if such information was, in its judgment, more prejudicial than probative. Fed. R. Evid .804(b)(1), 806, 403.

Finally, we affirm the district court's damage award without commenting on the methodology it employed, a point of contention among the parties. The parties conceded at oral argument that the amount to be paid by the defendants would be the same no matter which method was used.

The judgment of the District Court is hereby AFFIRMED.

FOR THE COURT,
Karen Greve Milton, Acting Clerk

By:_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the _____ day of December one thousand nine hundred and ninety-nine.

Lieberman
Plaintiff-Appellee,

V

Dkt No: 98-9165

Haddad
Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Haddad.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

Karen GREVE MILTON, Acting Clerk

By:_____

Beth J. Mead ,
Administrative Attorney

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE,OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 7 day of OCT, one thousand nine hundred and ninety-nine.

PRESENT:

HONORABLE JAMES L. OAKES,
HONORABLE ELLSWORTH VAN GRAAFEILAND
HONORABLE ROBERT D. SACK,

Circuit Judges.

ISAAC LIEBERMAN,
Plaintiff-Appellee,

- V. - No. 98-9165

ROBERT DUDLEY and J. SAVINELLI,
Defendants

JONATHAN HADDAD and DAVID W. COPPOLA,
Defendants-Appellants.

MANDATE

Jan 21 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ISAAC LIEBERMAN,
Plaintiff-Appellee,

- V. - No. 98-9165

ROBERT DUDLEY and J. SAVINELLI,
Defendants

JONATHAN HADDAD and DAVID W. COPPOLA,
Defendants-Appellants.

MOTION FOR STAY OF MANDATE

ORDER

BEFORE: HON. ROBERT D. SACK, HON. JAMES L. OAKES, HON. ELLSWORTH VAN GRAAFEILAND, C.JJ.

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED

FOR THE COURT:

KAREN GREVE MILTON
ACTING CLERK
By

Beth J. Meador

Administrative Attorney

Jan 21 2000